ZAIN AZAHARI BIN ZAINAL ABIDIN

v.

DATUK BANDAR KUALA LUMPUR

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J
[ORIGINATING MOTION NO. R1-25-118 OF 1992]
26 OCTOBER 1994

ADMINISTRATIVE LAW: *Issuing of development order - All the processes not followed - Increase in density of persons - Whether infringed the rules and regulations - Whether order in excess of jurisdiction.*

On 4 October 1990 the respondent granted a development order to Tradium Sdn. Bhd. (Developer) to commence the construction of a block of condominiums consisting of 11 units over 3 storeys and to increase the population density from 10 persons per acre. On 14 August 1992, the High Court of Malaya granted an order of certiorari and squashed the said development order. Subsequently, on 21 August 1992, the applicant received a notice from the respondent informing him of an application to develop the said lot and the residents are to put in their written objecctions (if any) within 14 days from date of notice.

On 3 September 1992, the applicant submitted his written objection. On 16 September 1992, the respondent heard the objections of the applicant. Subsequently on 22 September the respondent granted a new development order to recommence the said project and increase the population density of the area form 10 persons per acre to 47 persons per acre. The applicant filed a notice of motion for certiorari to quash the decision of the respondent dated 22 September 1992 on the following grounds.

i) the respondent was not seized with jurisdiction to make the development order in the light of the fact the there was no valid application to support the making of such an order.

ii) alternatively, if there was in fact a valid application capable of consideration, the consequent development order was not valid in the light of the time frames provided for in the Planning (development) Rules, 1970.

Held:

[1] By approving and issuing a development order over the subject land when the residential density had not been properly changed from 10 persons per acre to present change without having gone through the process, the Datuk Bandar had clearly infringed the existing status, as to current residential density of the subject land concerned without having affected that change at the time of the approval of the development order.

[2] The Datuk Bandar was clearly acting in excess of his jurisdiction and acting to the detriment of the rights of the adjoining owner of land who has a legitimate expectation that the residential density of his lot and that of his neighbouring land would not be changed without the Datuk Bandar having resorted to the provisions of the Rules before a change can be done and the applicant is entitled to expect the process of change would be faithfully followed by the Datuk Bandar.

[Application allowed].

Cases referred to:
Datin Azizah bte Abdul Ghani v. Dewan Bandaraya Kuala Lumpur [1993] 1 SCR 133 ***(cit)***
Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] 2 AC 629 ***(cit)***
London Residuary Body v. Lambeth London Borough Council and Ors. [1990] 2 All ER 309 ***(refd)***
Stringer v. Minister of Housing and Local Government and Ors. [1971] 1 All ER 65 ***(refd)***
Woon Kwok Cheng v. Tan Sri Datuk Chang Min Tat & 15 Ors. [1993] 1 AMR 14 ***(refd)***
Regina v. Barnsley Metropolitan Borough Council, Ex parte Hook [1976] 1 WLR 1052 ***(cit)***
R. v. Secretary of State for Social Services, ex parte Connolly [1986] 1 All ER 998 ***(refd)***
R v. Lancashire County Council, ex parte Huddleston [1986] 2 All ER 941 at p. 945 ***(refd)***
Council of Civil Service Unions and Ors. v. Minister for the Civil Service [1984] 3 All ER 935 ***(cit)***
Cheak Yoke Thong v. Public Prosecutor [1984] 2 MLJ 119 ***(cit)***
R. v. Monopolies and Mergers Commission, ex parte Matthew Brown plc [1987] 1 All ER 463 ***(cit)***
Bushell and Anor. v. Secretary of State for the Environment [1980] 2 All ER 608 ***(cit)***
Rex v. Stepney Corporation [1902] 1 KB 317 ***(cit)***

Legislation referred to:
Density Rules 1985
Drainage and Building Act 1974, s. 72
Federal Territory (Planning) Act 1982, s. 5(3), 22(1) & (4), 64 & 64(2)(c)
Planning development Rules, 1970, r. 2(3), 5, 5(2) & (4) & 6(2)
Rules of the High Court 1980. O. 41 r. 5

Other sources referred to:
Judicial Review: Law and Procedure, R.J.F. Gordon, p. 132
Judicial Remedies in Public Law, Clive Lewis

For the applicant - Hj. Sulaiman bin Abdullah (E. Sreesanthan, Anita Sockalingam, Rajiv Vijayanathan, Shamini Mahadevan with him); M/s. Zain & Co.,
For the developer - D.P. Naban (Nitin V. Nadkarni with him); M/s. Lee Hishammuddin
For the respondent - Y.B. Zaki Tun Azmi (Woo Lai Kea with him); M/s. Rashid & Lee

JUDGMENT

Hj. Abu Mansor bin Ali J:

This is an application for certiorari to quash the decision of the respondent dated 22 September 1992 granting a development order dated 22 September 1992 to the Developer, Tradium Sdn. Bhd., to recommence the construction project on Lot 175, Section 89, Jalan Langgak Golf, Kuala Lumpur.

The brief facts of the case are as follows:

(1) On 4 October 1990, the respondent granted a development order to the said developer to commence the construction of a block of condominiums consisting of 11 units over 3 storeys and to increase the population density from 10 persons per acre to 56 persons per acre in the area.

(2) On 13 August 1992, the High Court of Malaya granted an order of certiorari and quashed the said development order of 4 October 1990.

(3) Subsequently, on 21 August 1992, the applicant received a notice from the respondent informing him of an application to develop the said lot and the residents are to put in their written objections (if any) within 14 days from date of notice.

(4) On 3 September 1992, the applicant submitted his written objections.

(5) On 16 September 1992, the respondent heard the objections of the applicant.

(6) Subsequently, on 22 September 1992, the respondent granted a new development order to recommence the said project and increased the population density of the area from 10 persons per acre to 47 persons per acre.

(7) On 3 February 1993, after having obtained leave from the High Court, the applicant filed a notice of motion for certiorari to quash the decision of respondent dated 22 September 1992, hence this application.

(8) At the hearing of this application, the Court granted leave to the Counsel for the developer to address the Court as the developer would be the party to be affected by any order of the Court.

The issues to be decided by the Court were:

(a) Whether the respondent was seized with the jurisdiction to make the development order in the light of the fact that there was no valid application to support the making of such an order.

(b) Alternatively, if there was in fact a valid application capable of consideration, whether the consequent development order was valid in the light of the time frames provided for in the Planning (development) Rules, 1970.

The applicant's contentions were that there was no valid current application for a development order before the Datuk Bandar to enable him to consider. Yet, the Datuk Bandar had on 22 September 1992 granted a development order to the developer, Tradium Sdn. Bhd.

This was so because when the learned Judge quashed the development order dated 4 October 1990 granted to the said developer, the said development order fell together with the application on which it was based. Hence, says the applicant there is no longer a valid application before the Datuk Bandar to enable him to grant the development order dated 22 September 1992.

The applicant further submitted that the only way the Datuk Bandar could reconsider the original application was by way of obtaining a Court order as in the case of *Datin Azizah bte Abdul Ghani v. Dewan Bandaraya Kuala Lumpur* [1993] 1 SCR 133, and this the Counsel for the respondent failed to do. On 13 August 1992, when the High Court granted the order to quash the development order dated 4 October 1990, Counsel for the respondent had requested the Court to make a consequential order requiring the Datuk Bandar to reconsider the developer's application and the learned Judge had refused to grant such an order, leaving it to the Datuk Bandar to deal with the matter as he saw fit.

It is further submitted that the scheme of the Federal Territory (Planning) Act 1982 read together with the Planning (development) Rules, 1970 does not give the Datuk Bandar any power to revive a lapsed earlier application. It is to be noted that there are specific time frames provided for in the Planning (development) Rules, 1970 for example, under r. 5(2), the Datuk Bandar has the duty to inform the adjoining landowners of their right to object upon receipt of an application for a development order. Under r. 5(4), the authority shall within 14 days hear the objections filed. There is no provision for the extension of the said time frames and since the original application had lapsed, a fresh application must be filed.

To this the respondent replied as follows. The respondent contended that the High Court order dated 13 August 1992 only quashed the development order dated 4 October 1990 and not the application on which the development order was based.

In the book "*Judicial Remedies In Public Law*" (R. 6), the learned writer stated that the effect of granting an order of certiorari is to establish that a decision is *ultra vires*, and to set the decision aside. In many circumstances, the decision-maker will be free to reconsider the matter and to make a fresh decision (which may even be the same as the original decision) providing that in doing so he does not repeat the error or make any further reviewable errors.

In the case of *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629, it is said obiter that "the order of certiorari is of course entirely without prejudice to the making of a fresh removal order by the Director of Immigration after a fair inquiry has been held at which the applicant has been given an opportunity to make such representations as he may see fit as to why he should not be removed".

It is further submitted that there is no mention of a life span of an application for planning permission in any piece of legislation. The Planning Rules are silent as to the time limit between the receipt of an application for planning permission and the notification of the same by the authority to the neighbours. Thus, the application remained valid and the subsequent development order dated 22 September 1992 was issued after considering and processing the said application.

When the development order dated 4 October 1990 was quashed, it was the legality of the order itself with which the law was concerned. This should not affect the antecedents of the development order, like the application which led to the decision being made.

The developer's reply was that the effect of the *certiorari* dated 13 August 1992 was solely to set aside the development order dated 4 October 1990 because there was a failure to comply with the procedural aspect of its power. There is no necessity to submit a fresh application as the original application remained valid and the respondent was free to reconsider the matter and make a fresh decision.

Relying also on the case of *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629 and the book on *Judicial Remedies in Public Law* by Clive Lewis.

The argument by Counsel for the applicant that the scheme of the planning legislation suggests a time schedule and therefore the original application for planning permission has been spent, is a specious one. Rule 5 of the Planning (development) Rules, 1970 does not stipulate a specific time period after receipt of an application within which Form 4 must be sent to adjoining landowners.

Counsel submitted that the Datuk Bandar's decision in granting the development order dated 22 September 1992 is legal, valid and effective. There is no necessity to make a fresh application for planning permission. The decision was quashed because an opportunity to make representations was not given, therefore the decision was only procedurally defective. The authority in question is still entitled to reconsider the same application.

In fact the time frame so stated by Counsel for the applicant does not begin to run until notice in Form 4 is given by the Datuk Bandar is clear from reading r. 5 of the Planning (development) Rules, 1970. Therefore the issue that the application for planning permission had lapsed is a futile one.

The original application is still valid and the authority can reconsider it - the authorities here are clear and settled.

Issue (2) - Whether the respondent complied with the procedures set out in the Federal Territory (Planning) Act 1982 and the Planning (development) Rules, 1970 and in particular, whether s. 64 of the above-mentioned Act must be complied with when changing residential density.

Applicant's Contention

Concede that the Datuk Bandar has the discretion to grant planning permission but it is not an absolute discretion. He must take into consideration all material factors i.e. s. 22(1) & (4) of the Federal Territory (Planning) Act 1982. Here the Datuk Bandar did not take all material factors into consideration and in fact acted on an *ad hoc* basis.

The Datuk Bandar has increased the population density in the affected areas from 10 persons per acre to 47 persons per acre and in doing so, he had failed to comply with the rule making process as embodied in s. 64 of the said Act, read together with r. 2(3) of the Planning (development) Rules, 1970.

Section 64 states that the Commissioner may with the approval of the Minister make rules generally for the better carrying out of the provisions of this Act. Section 64(2)(c) in particular refers to the control of residential density. Submit that this suggests that if the Datuk Bandar wishes to change the density of a particular area, he has to make rules for it. An instance of this can be seen as when the Commissioner had on 30 October 1985 made the rule that all lands within the Federal Territory of Kuala Lumpur excluding lands located in plans Nos. 1040 and 1041 were zoned as residential with a density of 60 persons per 0.4 hectare (P3, p. 18).

The subject land here falls within Plan No. 1040. Submit that since land located in Plan No. 1040 are specifically excluded, the Datuk Bandar must then go through the above-mentioned rule making process before he can change its density.

Also, no where in the respondent's affidavit was it mentioned that the developer had made the required application for change of density as envisaged by the rules to be made in Form 3 of the First Schedule, neither was it mentioned that the Datuk Bandar referred to Form 3. This goes to show that Form 3 was never submitted.

Since neither of the above requirement was adhered to, the Datuk Bandar's decision in increasing the density of the area in question is seriously flawed and ought to be set aside.

Respondent's Reply

Section 22(4) of the Federal Territory (Planning) Act 1982 provides a statutory function. The entire law of planning is a creature of statute, imposing public interest restrictions on private enjoyment of land.

Under s. 22 of the said Act, the respondent is obliged to take into account only considerations permitted by the said Act. He is given a wide discretion. He is not bound to grant planning permission because the proposed development conforms with the development plan or refuse planning permission because the proposed development is not in conformity with the development plan or local plan (s. 22(1) & s. 22(4) of said Act refers).

Lord Templeman in *London Residuary Body v. Lambeth London Borough Council and Ors.* [1990] 2 All ER 309 stated that such a provision gave a wide discretion to the deciding authority.

Further, the English Court defined "material considerations" as considerations of a planning nature relating to the use and development of the land and not limited to amenity matters only. Refer to the case of *Stringer v. Minister of Housing and Local Government and Ors.* [1971] 1 All ER 65.

With regards to the increase in population density, it is our submission that the respondent, based on the Draft Structure Plan and s. 22(4) of said Act, is entitled to approve applications for planning permission which involved an increase in population density. The Draft Structure Plan (Exhibit "AR1", affidavit of En. Abdul Rashid b. Ibrahim dated 5 September 1994 - encl. 30) establishes the broad policy framework for the planning of Kuala Lumpur between 1980 and 2000. It envisages an increase in density from time to time, or else the population will remain stagnant.

Submit that the developer had complied with the Rules 1970 and had submitted Form 3 as required for the Datuk Bandar's consideration (Form 3 was exhibited in the affidavit of Mahadi bin Ngah dated 9 September 1994 but after having heard submissions from both sides, the Court had disallowed the affidavit to be admitted at this stage of the hearing).

Also, it is further submitted that the Density Rules 1985 only fixed density of lands outside Plan Nos. 1040 and 1041. Since the land concerned is located under Plan No. 1040, therefore there is no limit on density on this piece of land. The Datuk Bandar did not change any density limits. The fact that there is no rules pertaining to this area cannot preclude the Datuk Bandar from making a development order.

Submit that the respondent had complied with all procedures when he increased the density population of the subject land.

Developer's Reply

Concur with the respondent's Counsel's submission in respect of the discretion exercisable by the Commissioner in relation to the grant of planning permission. The discretion, though not unfettered, is indeed a very wide one. Although this discretion is subject to s. 22(4), it does not detract from the wide discretion conferred but it provides a guide to the exercise of such discretion.

Since the Court has declined to admit encl. (32), it is submitted that the legal rights and expectations of the applicant have not been affected by the alleged non-compliance of r. 2(3) of the 1970 Rules requiring applications for increase in residential density to be made in Form 3.

Rule 2(3) does not obligate the authority to give a copy of Form 3 to adjoining landowners to inform them of an application for the increase in residential density. In any event, there was an application for the increase in residential density contained in the original application for planning permission of which notice was given to the applicant in Form 4.

Issue (3) - Whether in the circumstances of this case, i.e. where the underlying rationale of the legislation is planning control and where the Commissioner is exercising a discretion under a residual power, the respondents are bound to give the grounds and/or reasons for their decision.

Applicant's Contention:

The applicant alleges that after the issue of the development order dated 22 September 1992, the respondent has failed, refused and/or neglected to provide the applicant with any reasons for such a decision. The applicant was also not furnished with notes of evidence taken at the hearing of the objections held on 16 September 1992 even though it was requested for.

In the case of *Woon Kwok Cheng v. Tan Sri Datuk Chang Min Tat & 15 Ors.* [1993] 1 AMR 14, it was stated obiter that whether a body, statutory or domestic, give reasons for this decision depends on what is fair in the circumstances. If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded to him. Submit this is the position in Malaysia.

The applicant further contends that since leave was granted by the High Court to pursue an order of certiorari, it is tantamount to saying that there is a *prima facie* defect in the decision of the authority concerned. Therefore, the decision maker must give full disclosure and set out the grounds for his decision - in the case of *Regina v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 WLR 1052.

The Datuk Bandar is duty bound to give cogent reasons to show that despite all the allegations and complaints, action taken was in compliance with the law. In this case, neither was done. The Datuk Bandar did not give the reasons for his decision.

Respondent's Reply

Under r. 5(4) of the Planning (development) Rules, 1970, the Datuk Bandar is to hear objections from the applicant, which he did on 16 September 1992. The respondent is not compelled to provide the applicant with the notes of evidence nor the minutes of such hearing.

Under r. 6(2), the respondent is required to convey its decision to the developer and to those persons who had filed their objections within 2 weeks of the hearing. There is no requirement whereby the respondent has to provide reasons for his decision.

In the case of *R. v. Secretary of State for Social Services, ex parte Connolly* [1986] 1 All ER 998, it was held, *inter alia*, that there was no requirement of natural justice that reasons had to be given when exercising a judicial discretion to grant or refuse leave.

Here, the Datuk Bandar has considered the application of the developer, the objections of the applicant and have had the benefit of experts in the various aspects of planning before the Datuk Bandar formed his decision to grant the said development order.

Also, it is clear from the affidavit in reply affirmed by Mokhtar bin Long Idris dated 4 March 1994 that the respondent have disclosed to this Court its reasons for having granted the said development order. Submit that the Court should not then substitute its own views as to what may be a fairer answer to the problem from that decided by the Planning Authority.

Developer's Reply

There is no statutory obligation on the authority to give reasons for the decision to grant planning permission. Rule 6(2) of the 1970 Rules merely requires the authority to convey the decision itself to the applicant and objectors within 2 weeks after the hearing. From here, it

can be gathered that the legislature did not intend the Datuk Bandar to give reasons if planning permission is granted but if planning permission is refused, legislature requires him to give reasons to the developer, not to the applicant whose right is only to object.

It is submitted that there is an underlying policy not to disclose reasons to such objectors. The Courts have never required a public authority to disclose everything as it may not be in the public interest to do so.

In the absence of such statutory obligations to give reasons, it is unusual for one to be implied by the Court as a requirement of natural justice or fairness. Only when the person requesting reasons, establishes that he has a legitimate expectation which has been *prima facie* affected, then only may the Court impose an obligation to give reasons and even then, the reasons to be disclosed are confined to matters pertaining to the particular legitimate expectation. Refer to the case of *R v. Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 at p. 945.

Applicant's Reply

It is not sufficient to just say that the applicant was represented, therefore, he was given a fair hearing. There is no evidence of what was said and represented to the Minister. Was the applicant's objections fully conveyed to the decision maker? What was in the report that was forwarded to the Minister for his considerations? The Court must have some material from the Datuk Bandar - he must give the reasons for his decision.

Counsel for respondent referred to the affidavit of Mokhtar bin Long Idris dated 4 March 1994 to say that the respondent have disclosed to this Court, his reasons for granting the said development order. Submit that what En. Mokhtar is affirming to in his affidavit is purely hearsay evidence - O. 41 r. 5 Rules of the High Court 1980. He does not really know for a fact whether the Datuk Bandar really acted on Government policy, recommendations etc.

Submit that the Datuk Bandar should himself affirm an affidavit and set out all the points he took into consideration, thus setting out the grounds for his decision.

Issue (4) - Whether there was sufficient material before the respondent to enable him to reasonably arrive at the decision dated 22 September 1992, in other words, whether that decision was a perverse one.

Applicant's Contention

The applicant contend that he was not given a fair hearing by the authority concerned, therefore the decision arrived at is a perverse one.

The applicant was notified that the hearing of his objections was fixed for 16 September 1992 by way of a letter dated 11 September 1992. The applicant had in fact left for London on 10 September 1992 for personal business. Counsel for applicant sought an adjournment of the hearing by way of letter dated 15 September 1992. At the hearing on 16 September 1992, the applicant was represented by his son and his solicitors. They were then informed that their application for adjournment was denied, thus denying the applicant a chance to be present personally to voice his objections.

It is also submitted that the authority did not provide a fair hearing to the applicant, in the proper sense of the word. They merely gave them an opportunity to come forward to comply with the provisions of the Act. No questions were asked of the applicant. It appeared that the authority was only paying "lip service" to the Planning Rules and expedited the said hearing.

However, the reverse can be said when the authority heard the developer. For the first 15 minutes, the authority heard the developer without the presence of the applicant's representatives - much could have transpired in that 15 minutes. Even then, in the presence of the applicant's representatives, the authority was more attentive when the developers put forward their submissions.

The hearings conducted were clearly "one-sided" and in breach of natural justice. For the first 15 minutes of the session with the developers, there seems to be a private meeting between the developer and the decision makers/persons making the recommendations.

The other reason as to why the decision is a perverse one is because the hearing was conducted before the then Deputy Director of Jabatan Perancang dan Kawalan Bangunan di Dewan Bandaraya, Kuala Lumpur together with 2 others. As submitted earlier there is no evidence as to whether all the applicant's objections were duly conveyed to the decision maker. En. Mokhtar had prepared a report which was forwarded to the Minister and this report is not even produced in Court. This report is important as it could show what the decision makers had before them and that they had the correct set of facts to address their minds on.

Respondent's Reply

The applicant seeking to quash the development order dated 22 September 1992 must do so within the 3 categories of challenge enumerated in the case of *Council of Civil Service Unions and Ors. v. Minister for the Civil Service* [1984] 3 All ER 935, i.e.

(1) Illegality;

(2) Irrationality - test is whether the decision is so outrageous as to defy logic such that no sensible person would make it;

(3) Procedural impropriety.

Submit the applicant has not been able to show "biasness" on any specific act or omission on the part of the respondent that can constitute bias. This is clear from the case of *Cheak Yoke Thong v. Public Prosecutor* [1984] 2 MLJ 119.

Just because the respondent rejected the application of the applicant for an adjournment of the hearing on 16 September 1992 does not mean that the procedure adopted by the respondent is flawed. Rule 5(4) of the Planning Rules states that the authority shall hear any objections within 14 days after the time specified to file the objections, which is, 14 days from date of notification by the authority. In view of that, the respondent did not have the power to adjourn the hearing till the return of the applicant in early October. In any event, the applicant was ably represented by his son and his solicitor.

With regards to the hearing, it should be noted that the hearing of the applicant took 3 hours while the developer's hearing took only 15 minutes - these are not denied by the applicant. Also, the lawyers for the applicant were present at the hearing held for the developers. They were able to comment on the demeanour of the officers of Dewan Bandaraya Kuala Lumpur (i.e. that they were more attentive and answered willingly to any questions put to the developers) at the developer's hearing. The applicant's representatives were not merely given the opportunity to be at the hearing of the developer's submission but were also allowed to question the developers.

It is submitted that natural justice is a flexible concept, and in so far as the right to a hearing is concerned, fairness is not achieved by an adversarial hearing alone but whether the aggrieved party was denied a fair hearing.

In the case of *R. v. Monopolies and Mergers Commission, ex parte Matthew Brown plc* [1987] 1 All ER 463 - it was held, *inter alia*, "that the concept of fairness was itself flexible and the question in each case was whether the Commissioner had adopted a procedure so unfair that it could be said to have acted with manifest unfairness".

Here, submit the applicant have a right to a hearing to voice their objections which was duly accorded to them. They do not have a right to an adversarial hearing process.

During the hearing of the applicant's objections, the applicant's representatives took down notes. The applicant's notes exhibited herewith at p. 40, P2 shows that all issues which are relevant and raised by applicants have been brought to the attention of the respondent and were duly considered. The fact that all these matters were raised at the hearing before En. Mokhtar bin Long Idris and which was subsequently reported to the Datuk Bandar must be inferred to mean that he had brought all those points to the attention of the Minister unless there were evidence to the contrary. There is no such evidence here.

With regards to the procedure adopted at the hearing itself, submit that the procedure of delegating the function of hearing and reporting on the objections is common and usual in ministerial decision making where a public inquiry was to be held before the decision is made. The function is usually assigned to a ministerial official whose report the Minister considers before making his decision. This procedure was adopted in the case of *Bushell and Anor. v. Secretary of State for the Environment* [1980] 2 All ER 608.

It is the same in this case where the Director of Planning heard the objections and transmitted a report of the proceedings to the Datuk Bandar for his consideration.

Developer's Reply

Concur with the submission of the respondent. Will stress that there is no obligation upon the authority during the hearing to allow the applicant's representatives to cross-examine the developer - yet, this was done, thus giving the applicant more rights than he is entitled to.

Counsel for the applicant submits that there was no proper conduct of the hearing as for 15 minutes, the developer was heard in the absence of the applicant. However, upon a clear construction of r. 5(4) of the 1970 Rules, there is only a requirement that the authority "hear the applicant, and those persons who have filed their objections". There is no requirement that these parties should be heard in each other's presence.

Applicant's Reply

There is still a real doubt as to whether the applicant was given a full and proper hearing in the proper sense of the word and that his objections were fully communicated to the Datuk Bandar.

Counsel for the respondent submitted that the fact that the applicant's representatives were allowed to be heard is sufficient satisfaction of his "legitimate expectation" but that is precisely the complaint of the applicant. Query - is that all the Datuk Bandar need to do, i.e. to put his officers there to hear the applicant's objections? Was it not necessary for the authority

to show that the Datuk Bandar did address his mind to the objections raised by the applicant? There was nothing in the replies filed by the respondent and the developer to indicate that the applicant's objections were properly considered.

Counsel for both respondent and developer did not really address the point that the developers were given a hearing of about 15 minutes without our presence. The unfairness in conducting the hearing and the real possibility that something is going on behind the applicant's back is enough to vitiate this decision.

Issue (5) - Whether the officer who was executing the discretionary power to grant the development order had the power to do so at the relevant time.

Applicant's Contention

There is no real evidence as to who was the person who made the decision to grant the development order dated 22 September 1992.

Refer to the development order exhibited at P2, pp. 73-80. It can be seen that the development order was signed by En. Mokhtar. Query - was he the one who made the decision? If so, did he have the power to so decide?

Under the Federal Territory (Planning) Act 1982, the decision is with the Datuk Bandar. It is he who must make the decision to grant or not to grant planning permission. Assuming everything else is satisfactory (which is denied), did the Datuk Bandar make the decision to grant the development order dated 22 September 1992 in this case?

Respondent's Reply

There is no allegation by the applicant that the same person cannot make a decision on the same application.

In any event, in cases such as this whereby there is no other person empowered by the Act to consider the application, therefore, the same person must have considered the application again namely the Datuk Bandar.

Developer's Reply

Section 22(1) of the 1982 Act confers the power to grant planning permission upon the Commissioner.

Section 5(3) of the 1982 Act, expressly allows the delegation of powers to other persons. FGG No. 1036/1987 provides that the power to grant planning permission has been delegated to the Ketua Pengarah, Timbalan Ketua Pengarah, Timbalan Ketua Pengarah II, Pengarah and Timbalan Pengarah.

From this, it is apparent that the decision to grant planning permission need not be made by the Commissioner, i.e. the Datuk Bandar himself.

Other Miscellaneous Issues Raised

(6) Demolition of existing structure.

Applicant's Contention

That the structure built on the site was illegal as from 13 August 1992 and should be demolished as the development order pursuant to which the structure was erected was quashed.

Instead, the Datuk Bandar went on to consider that the building is already 2½ storeys up which is an irrelevant consideration. The Datuk Bandar also fettered his discretion in taking into account the statement of the Prime Minister as reported in the newspapers (Exhibit P2, p. 11 & 12).

In the book "*Judicial Review: Law and Procedure*" by R.J.F. Gordon at p. 132 - except where statute otherwise provides, a local authority must not act at the behest of another. To do so is to fetter discretion just as much as delegation of decision making. This is well shown by the facts of *Rex v. Stepney Corporation* [1902] 1 KB 317. There mandamus was granted directing the corporation to reconsider the amount of compensation payable to a vestry clerk for loss of office. Its discretion had never been exercised because it was mistakenly believed that Treasury practice dictated that a specific deduction had to be made if the office was held on a part time basis.

Here, submit the Datuk Bandar did not act upon any real judgment of his own. He did not act on any documents but felt himself bound by what the Prime Minister had said.

Respondent's Reply

The Court did not give any direction/order to that effect.

The only provisions in law for buildings which are erected without the requisite authorisation is found in s. 72 of the Street, Drainage and Building Act, 1974 (Exhibit R1, pp. 9-10).

Here, after having considered the overall circumstances, the respondent issued a stop-work order on 13 August 1992 against the developer to cease all construction work immediately. This in itself constituted a penalty as the developer had erected the structure in good faith.

Since no order for demolition was prayed for nor made by the Court, the issue of the stop-work order constitute sufficiently appropriate measures in accordance with the law.

The Prime Minister's statements in the newspapers are only evidence of the Government's policy. Here, the Datuk Bandar did not act under another's dictation. He only considered the general policy on the planning of the Government. There was no direction or dictation by the Government with respect to the applicant's land.

Developer's Reply

The existing building of 2½ storeys is not a breach of his legitimate expectations in regard to the granting of the planning permission.

This is because the only legitimate expectation he has under the Planning (development) Rules, 1970 is under r. 5 - i.e. to receive a notice in Form 4 from the authority informing him of his opportunity to put forward objections in writing, and thereafter be heard in person.

In the case of *Datin Azizah bte Abdul Ghani v. Dewan Bandaraya Kuala Lumpur* [1993] 1 SCR 133 the clear non-compliance with r. 5 of 1970 Rules resulted in her legitimate expectations not being fulfilled - she did not receive a copy of Form 4. The Court therefore held that she was entitled to judicial review.

On the facts of this case, however, there has been full compliance with the requirements of r. 5 and the legitimate expectations of the applicant has been fulfilled.

Here, the property rights of the applicant has not been affected. In law, a person cannot have a legitimate expectation as to what an adjoining legal structure as the developer had acted in good faith on the development order dated 4 October 1990 and which at that point of time, was valid. The stopwork order dated 13 August 1992 was immediately obeyed.

(7) Access Road.

Applicant's Contention

Road access is narrow. Should have taken that issue into consideration.

Developer's Reply

The access to and from the applicant's residence is via Jalan U Thant but the access to and from the Apartment Block is via Jalan Langgak Golf. The fact that there are separate access roads to and from the applicant's residence and the Apartment Block means that there is no disruption and interference with traffic flow to and from applicant's residence.

Developer's Conclusion

The remedy of certiorari will not issue on the facts of this case as the applicant has not shown a breach of his legitimate expectations in regard to the granting of the planning permission.

This is because the only legitimate expectation he has under the Planning (Development) Rules, 1970 is under r. 5 - i.e. to receive a notice in Form 4 from the authority informing him of his opportunity to put forward objections in writing, and thereafter be heard in person.

In the case of *Datin Azizah bte Abdul Ghani v. Dewan Bandaraya Kuala Lumpur* [1993] 1 SCR 133 the clear non-compliance with r. 5 of 1970 Rules resulted in her legitimate expectations not being fulfilled - she did not receive a copy of Form 4. The Court therefore held that she was entitled to judicial review.

On the facts of his case, however, there has been full compliance with the requirements of r. 5 and the legitimate expectations of the applicant has been fulfilled.

Here, the property rights of the applicant has not been affected. In law, a person cannot have a legitimate expectation as to what an adjoining landowner does to his land unless it is something which results in a tort or comes within the principle of *Rylands v. Fletcher*. Even then, it is likely to be limited to a claim for damages and other consequential remedies.

The proposed Apartment Block is an exclusive, luxury, low density and low rise structure compared to the applicant's residence which is a large, imposing 3 storey structure. Therefore, the Apartment Block will not pose as a threat to the applicant's enjoyment of privacy and access to natural light. The applicant has no basis for a complaint as there has been no breach of his legal rights.

Submit the development order dated 22 September 1992 was issued in accordance with the law. There are no procedural defects:-

(1) the August notice and September notice were given to the applicant;

(2) the September hearing was conducted by a duly authorised committee according to all prescribed procedures, therefore, the development order is legal, valid and effective.

After having heard all arguments, this Court conclude as follows. The Court is mindful that in a certiorari application, it is not hearing an appeal but exercising a limited power of review to see that all the process used by the Datuk Bandar leading to the issuance of the development order met with all legal requirements.

The Court comes to the conclusion that both the Datuk Bandar and the developer had met all requirements except in one aspect relating to residential density of the subject land.

It has been proved beyond doubt in the arguments from all sides that the Datuk Bandar had gone through and brought a change in residential density in respect of two lots but definitely excluding this subject lot over which the development order had been granted by him.

The concerned Gazette Notification was PU(A) 501 of 1982 and it appeared as follows:

> PU(A) 501
>
> Federal Territory (Planning) Act 1982
>
> Federal Territory (Planning) (Zoning And Density) Rules 1985
>
> IN exercise of the powers conferred by s. 64 of the Federal Territory (Planning) Act 1982, the Commissioner of the City of Kuala Lumpur, with the approval of the Minister, makes the following rules:
>
> 1. These Rules may be cited as the Federal Territory (Planning) (Zoning and Density) Rules 1985.
>
> 2. All lands within the Federal Territory of Kuala Lumpur excluding lands located in plans Nos. 1040 and 1041 are hereby zoned as residential with a density of 60 persons per 0.4 hectare.
>
> Made the 30 October 1985.
> [PHEU2/33/83; PN. (PU2) 396.]
>
> Dato' Elyas bin Omar,
> Commissioner of the City of Kuala Lumpur
>
> Approved the 31 October 1985.
>
> Dato' Shahrir bin Abdul Samad,
> Minister of the Federal Territory

The above Zoning and Density Rules was made pursuant to the Datuk Bandar's powers under s. 64 of the Federal Territory (Planning) Act 1982 which read as follows:

> 64.(1) The Commissioner may with the approval of the Minister make rules generally for the better carrying out of the provisions of this Act.
>
> (2) In particular and without prejudice to the generality of the foregoing powers such rules may provide for all or any of the following matters, namely-
>
> (a) regulating the development of land in relation to proper planning;
>
> (b) ...
>
> (c) the control of residential density, floor area, plot ratio, plinth area, and uses of buildings or land.

It is to be noted that before such change can be effected it needed the approval of the Minister. It was some process and some formality as the Gazette No. PU(A) 501 of 1982 clearly show.

By his approving and issuing a development order over this subject land when the residential density had not been properly changed from 10 persons per acre to the present change; without him having gone through the process, the Datuk Bandar had clearly infringed the existing status, as to the current residential density of the subject land concerned. I am of the view without having effected that change at the time of the approval of the development order, the Datuk Bandar was clearly acting in excess of his jurisdiction and acting to the detriment of the rights of the adjoining owner of the land who has a legitimate expectation that the residential density of his lot and that of his neighbouring land would not be changed without the Datuk Bandar having resorted to the provisions of the Rules before a change can be done and the applicant is entitled to expect that the process of change would be faithfully followed by the Datuk Bandar.

By reason of the Datuk Bandar's failure to have the residential density for the subject lot changed at the time of the approval of the development order bringing in its train such change, I find the applicant had succeeded in his application in terms prayed for and I hereby grant an order in terms and quash the decision of the Datuk Bandar granting the development order dated the 22 September 1992 with costs to be taxed.

As encl. (23) is withdrawn by Mr. Nadkarni my order is encls (23) be struck out with costs to the applicant.